MONATECH (M) SDN BHD

v.

JASA KERAMAT SDN BHD

FEDERAL COURT, KUALA LUMPUR
AHMAD FAIRUZ CJ (MALAYA)
HAIDAR MOHD NOOR FCJ
MOHTAR ABDULLAH FCJ
[CIVIL APPEAL NO: 02-1-2002]
20 SEPTEMBER 2002

CIVIL PROCEDURE: *Contempt of court - Disposing subject matter of a pending proceeding for mareva injunction - Whether an act of contempt interfering with the due administration of justice - Whether subject matter was sufficiently serious and sufficiently closely connected with proceedings - Whether subject matter disposed of in questionable dealings in view of pending proceedings*

CIVIL PROCEDURE: *Appeal - Leave to appeal - Whether case on question of facts - Whether leave rightfully granted in view of s. 96 Courts of Judicature Act 1964*

The plaintiff commenced arbitration proceedings against the defendant in 1997 in relation to disputes pertaining to a building contract executed by the said parties. On 1 June 1998 the plaintiff filed an application pursuant to s. 13(6)(f) and (h) of the Arbitration Act 1952 to secure some of its claims up to the value of RM2.5 million pending the award of the arbitrator. On the same date the plaintiff filed a summons in chambers *ex parte* for mareva injunction to restrain the defendant from disposing off its assets. The plaintiff succeeded in obtaining the mareva injunction order on 24 August 1999 but by that time the defendant's assets had been disposed off by its directors and general manager ('the contemnors'). The plaintiff filed an action against the defendant for contempt of court but the learned judge dismissed the application. On appeal, the Court of Appeal ruled that there was contempt of court on the facts and set aside the order of the learned judge. The case was then remitted to the High Court for sentence and the defendant applied for leave to appeal to this court which was granted.

Two questions were posed before this court. Firstly, whether the defendant was free to dispose of its assets until the mareva injunction was granted. Secondly, if the answer to the first question was in the affirmative, whether the defendant could be found guilty of contempt of court by interfering with the due administration of justice by its conduct in disposing of its assets.

Held:
Per Haidar Mohd Noor FCJ

[1] The Court of Appeal in finding on the facts of the case that there was commission of contempt of court relied on what Llyod LJ in *Attorney-General v. Newspaper Publishing PLC, inter alia* said, *ie*, that the act must be sufficiently serious and sufficiently closely connected with the particular proceedings. This is premised on the fact that not all acts which are calculated to interfere with the administration of justice or the course of justice will necessarily ground a charge of contempt. (p 409 d-e)

[2] This court fully subscribed to what Lord Muskill said in *Harrow London Borough Council v. Johnstone*, *ie*, that even when there is no injunction to make explicit the importance of preserving the subject matter of an action until trial, a wanton destruction of that subject matter, with the intention of impeding a fair and fruitful trial, is capable of being a contempt of court. Therefore, the answer to the first question would be in the affirmative subject to the qualification that there was no wanton destruction of the subject matter with the intention of impeding a pending proceeding for mareva injunction. It is the interests of justice that the court has to determine. It all depends on the circumstances of the particular case. (p 411 a-g)

[3] What was needed to be considered was not so much of no injunction order having been made and therefore that the defendant was at liberty to dispose off its assets but more towards its conduct in disposing off its assets with its eyes open to the pending mareva injunction proceedings. The speed with which the assets were disposed off and to parties that were closely related to the persons in control of the defendant were not seriously disputed. In some of the sales, the transfers were executed even without full payments. Further, at the time when the mareva injunction was granted, the defendant chose to remain silent and let the order be made knowing fully well that it would be a futile order and it would come to naught. That counsel for the defendant had no knowledge of disposal of all the assets was not a good reason. It is the duty of counsel to get instructions from the defendant on the disposal of its assets so that counsel can then inform the court accordingly in the event the court is minded to grant a mareva injunction order. (pp 414 g-i & 415 a-b)

[4] On the particular facts and circumstances of the case, the court agreed with the finding of the Court of Appeal in concluding that the intention of the defendant clearly was to interfere with the due administration of justice. There was lack of positive perception of the facts of the case by

the learned judge when he held that there was no contempt of court committed by the contemnors. He was more focussed on there being no mareva injunction order or for that matter no interim order and therefore the defendant was at liberty to dispose off its assets. (p 415 c-f)

[5] In the absence of a specific legislation on contempt of court, the contempt of court in this country is guided by common law principles. The standard of proof is the criminal standard of proof, be it classified as "civil contempt" or "criminal contempt" though such classification may tend to mislead rather than to assist. The court was concerned here with the conduct involving an interference with the due administration of justice and not conduct involving a breach or assisting in the breach of a court order. The standard of proof required herein was proof beyond reasonable doubt. (p 416 g-h)

[6] After considering the acts of the defendant and the circumstances in which they were carried out, the Court of Appeal ruled that the intention was clearly to dissipate all the assets in questionable dealings to frustrate the mareva injunction proceedings then pending and any judgment that might be obtained later by the plaintiff in the arbitration proceedings. There was no ground to disagree with the findings of facts by the Court of Appeal on the issue of contempt of court against the contemnors. Therefore, the second question would be answered in the affirmative. (p 417 b-d)

[Appeal dismissed; order of Court of Appeal affirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif memulakan prosiding timbang tara terhadap defendan pada tahun 1997 berdasarkan pertelingkahan terhadap kontrak pembinaan yang ditandatangani oleh mereka. Pada 1 Jun 1998 plaintif memfailkan satu permohonan di bawah s. 13(6)(f) dan (h) Akta Timbang Tara 1952 untuk melindungi tuntutannya yang bernilai RM2.5 juta sementara menunggu keputusan penimbang tara. Pada tarikh yang sama plaintif memfailkan satu saman dalam kamar *ex parte* untuk suatu injunksi mareva untuk menahan defendan daripada melupuskan aset-asetnya. Plaintif berjaya mendapat perintah injunksi mareva pada 24 Ogos 1999 tetapi pada masa yang sama aset-aset defendan telah dilupuskan oleh pengarah-pengarahnya dan pengarah urusan ('pihak-pihak menghina'). Plaintif memfailkan suatu tindakan terhadap defendan untuk penghinaan mahkamah tetapi hakim yang bijaksana menolak permohonan tersebut. Semasa rayuan, Mahkamah Rayuan memutuskan terdapatnya penghinaan mahkamah atas fakta-fakta dan mengetepikan perintah hakim yang bijaksana. Kes kemudiannya telah dihantar balik ke Mahkamah Tinggi untuk hukuman dan defendan memohon kebenaran untuk merayu ke mahkamah ini yang telah dibenarkan. Dua soalan

telah dikemukakan ke mahkamah ini. Pertama, sama ada defendan bebas untuk melupuskan asetnya sehingga injunksi mareva diberikan terhadapnya. Kedua, sekiranya jawapan kepada soalan pertama adalah ya, sama ada defendan didapati bersalah menghina mahkamah dengan mencampuri urusan keadilan di dalam tindakannya melupuskan aset-asetnya.

Diputuskan:
Oleh Haidar Mohd Noor HMP

[1] Mahkamah Rayuan di dalam mendapati terdapat penghinaan mahkamah berdasarkan fakta-fakta kes bergantung kepada Llyod LJ dalam *Attorney General lwn. Newspaper Publishing PLC inter alia* bahawa, tindakan tersebut mestilah cukup serius dan cukup hampir berkaitan dengan prosiding berkenaan. Ini adalah berasaskan kepada fakta bahawa bukan semua tindakan yang dianggarkan mencampuri urusan keadilan atau perjalanan keadilan semestinya mengasaskan tuduhan penghinaan.

[2] Mahkamah bersetuju penuh dengan apa yang dinyatakan Lord Muskill di dalam *Harrow London Borough Council v. Johnstone* iaitu, sekalipun tiada injunksi untuk menjaga kepentingan subjek perkara sesuatu tindakan sehingga perbicaraan, pemusnahan sewenang-wenangnya subjek perkara tersebut dengan tujuan menghalang perbicaraan yang adil dan berkesan adalah penghinaan mahkamah. Oleh itu, jawapan kepada soalan pertama adalah ya tertakluk kepada syarat tiada pemusnahan sewenang-wenangnya subjek perkara dengan niat menghalang suatu prosiding mareva injunksi yang belum selesai. Adalah kepentingan keadilan yang perlu diputuskan oleh mahkamah. Semuanya bergantung kepada suasana kes yang tertentu.

[3] Apa yang perlu dipertimbangkan bukanlah sama ada tiada perintah injunksi yang dibuat dan dengan itu defendan bebas melupuskan aset-asetnya tetapi tindakannya melupuskan aset-asetnya dengan mata terbuka terhadap prosiding injunksi mareva yang belum selesai. Kepantasan di mana aset-aset tersebut dilupuskan dan kepada pihak-pihak yang rapat dengan individu-individu yang menguasai defendan tidak secara serius dipertikaikan. Di dalam beberapa jualannya, pindahmilik dimeterai tanpa bayaran penuh. Lagi, pada masa injunksi mareva diberikan, defendan memilih untuk berdiam diri dan membiarkan perintah dibuat dengan pengetahuan ianya adalah sia-sia. Bahawa peguam defendan tidak tahu pelupusan aset-aset tersebut bukanlah alasan yang baik. Adalah tanggungjawab peguam untuk mendapatkan arahan daripada defendan berkenaan pelupusan aset-aset tersebut supaya peguam boleh memaklumkan mahkamah sekiranya mahkamah hendak memberikan perintah injunksi mareva.

[4] Atas fakta-fakta dan keadaan kes yang tertentu, mahkamah bersetuju dengan penemuan Mahkamah Rayuan bahawa niat defendan adalah jelas untuk mencampuri urusan perjalanan keadilan. Terdapat ketiadaan persepsi positif fakta-fakta kes oleh hakim yang bijaksana bila beliau berpendapat tiada penghinaan mahkamah dilakukan oleh pihak-pihak menghina. Beliau lebih memfokuskan kepada tiada perintah injunksi mareva atau tiada perintah interim dan defendan adalah bebas untuk melupuskan aset-asetnya.

[5] Di dalam ketiadaaan perundangan khusus berkaitan menghina mahkamah, menghina mahkamah di negara ini adalah berdasarkan prinsip-prinsip common law. Beban pembuktian adalah beban pembuktian jenayah, tidak kira ianya diklasifikasikan sebagai "penghinaan sivil" atau "penghinaan jenayah" biarpun klasifikasi tersebut mungkin mengelirukan daripada membantu. Mahkamah di sini lebih prihatin dengan tindakan yang melibatkan campurtangan urusan perjalanan keadilan dan bukan tindakan melibatkan pelanggaran atau membantu pelanggaran perintah mahkamah. Beban pembuktian yang diperlukan di sini adalah bukti melebihi keraguan munasabah.

[6] Setelah meneliti tindakan-tindakan defendan dan keadaan-keadaan di mana mereka dilakukan, Mahkamah Rayuan memutuskan bahawa niatnya adalah terlalu jelas, ianya tidak lain dan tidak bukan untuk melupuskan kesemua aset-aset dalam hubungan-hubungan yang meragukan untuk mengecewakan prosiding injunksi mareva yang belum selesai dan sebarang penghakiman yang mungkin diperolehi kemudian oleh plaintif di dalam prosiding timbang tara. Tiada asas untuk tidak bersetuju dengan penemuan fakta-fakta oleh Mahkamah Rayuan atas isu penghinaan mahkamah oleh pihak-pihak menghina. Oleh itu, soalan kedua adalah dijawab sebagai ya.

Rayuan ditolak; perintah Mahkamah Rayuan disahkan.]

Case(s) referred to:

AG v. Butterworth [1963] 1 QB 696 ***(refd)***
AG v. Hislop & Anor [1991] 1 All ER 911 ***(refd)***
AG v. Newspaper Publishing Plc [1987] 3 All ER 276 ***(refd)***
AG v. Newspaper Publishing Plc [1988] 1 Ch 333 ***(refd)***
AG v. Times Newspaper Ltd [1992] 1 AC 91 ***(refd)***
Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd & Ors [1986] 2 CLJ 109; [1986] CLJ (Rep) 58 ***(refd)***
Chandra Sri Ram v. Murray Hiebert [1997] 3 CLJ Supp 518 ***(foll)***
Harrow London Borough Council v. Johnstone [1997] 1 WLR 459 ***(refd)***
Houng Hai Hong & Anor v. MBf Holdings Bhd & Anor & Others Appeals [1995] 4 CLJ 427 ***(refd)***

In re Septimus Parsonage & Co [1901] 2 Ch 424 ***(refd)***
Ismail v. Polish Ocean Lines [1976] 1 All ER 902 ***(refd)***
Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 ***(refd)***
Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd [2001] 4 CLJ 549 ***(refd)***
Menteri Sumber Manusia v. Association of Bank Officers [1999] 2 CLJ 471 ***(refd)***
Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 ***(refd)***
TO Thomas v. Asia Fishing Industry Pte Ltd [1977] 1 MLJ 151 ***(refd)***

Legislation referred to:
Arbitration Act 1952, s. 13(6)(f), (h)
Courts of Judicature Act 1964, ss. 13, 78, 96(a)
Federal Court Rules 1995, rr. 47(4), 57(1), (2)
Rules of the High Court 1980, O. 25 r. 2(2)

For the appellant - V Sithambaram (P Navaratnam & S Parameswaran); M/s Sitham & Assoc
For the respondent - Karin Lim Ai Ching (Lim Hok Siang & Lim Chong Fong); M/s Presgrave & Matthews

[Appeal from Court of Appeal, Civil Appeal No: P-02-638-2000]

Reported by Usha Thiagarajah

JUDGMENT

Haidar Mohd Noor FCJ:

The issue before this court is in relation to a contempt of court not for breach of a particular order of court but for conduct of interfering with the due administration of justice or the course of justice by disposing the subject matter of a pending proceeding for mareva injunction.

The learned judge found on the facts that no contempt of court was committed and hence dismissed the application. The Court of Appeal found otherwise on the facts and ruled there was contempt of court and set aside the order of the learned judge. It remitted the case to the High Court for sentence. At first blush it would appear to be essentially a question of facts in which leave should not have been granted in this appeal as s. 96(a) of the Courts of Judicature Act 1964, has not been satisfied. That in fact was the stand taken by counsel for Jasa Keramat Sdn. Bhd. in opposing the leave application of Monatech (M) Sdn. Bhd. to this court.

We will first consider whether that is the correct position.

In this judgment we will refer the parties according to their positions in the High Court, that is, the appellant as 'the defendant' and the respondent as 'the plaintiff' and the three persons namely, the appellant's directors Khor Kok Boon and Mohd. Dzolkefli bin Jaafar Sedik and the appellant's general manager, Khor Kok Thye as the 'contemnors'.

When this court granted leave to appeal to the defendant on 8 January 2002, the question framed at p. 11 of the Appeal Record Volume 1 reads:

> Whether a Defendant against whom an application for a Mareva injunction is pending in Court, is free to dispose of his assets until the moment, when the Mareva injunction is granted against him.

In the course of hearing the appeal, we pointed out to counsel for the defendant that we do not think the question as framed permits of any answer other than "It all depends", which is not very helpful. However, all concerned know that the real issue is whether in the circumstances of this case, the contemnors could be guilty of contempt of court and the question can, if necessary, be rephrased to raise that issue. (*A-G v. Newspaper Publishing Plc*. [1987] 3 All ER 276 at p. 290); *Ismail v. Polish Ocean Lines* [1976] 1 All ER 902, [1976] QB 893).

Counsel for the defendant attempted to seek leave of this court to amend the motion *viva voce*. Counsel for the plaintiff objected. We ordered the defendant to file a motion to seek leave of this court to amend or rephrase the original question.

Solicitors for the defendant accordingly filed a motion on 30 April 2002 to seek leave of this court to put in a consequential question framed as question (2). A copy of the motion was served on the solicitors for the plaintiff. The motion is supported by the affidavit of Mr. Sithambaram, counsel for the defendant, together with, *inter alia*, a copy of the original motion filed earlier on (marked as exh. "VS1") and the memorandum of appeal (marked as exh. "VS4").

The plaintiff's counsel put in an outline submission objecting to the defendant's motion.

After hearing counsel for both parties, we allowed the motion and ordered costs to follow the event of the appeal.

We allowed the motion by virtue of the discretionary power vested in this court under r. 57(2) of the Federal Court Rules 1995 which provides the important concession to the appellant (defendant) by providing that 'the appellant shall not at the hearing without leave of the court put forward any

other ground of objection ...'. This court had the occasion to consider r. 57(2) read with rr. 47(4) and 57(1) in *YB Menteri Sumber Manusia v. Association of Bank Officers* [1999] 2 CLJ 471, (distinguishing the Federal Court case of *Sababumi (Sandakan) Sdn. Bhd. v. Datuk Yap Pak Leong* [1998] 3 CLJ 503) wherein Edgar Joseph Jr, FCJ, speaking for the court said at p. 487:

> Clearly, therefore, having regard to these provisions, the Federal Court has the **power** and therefore the **discretion** to permit an appellant to argue a ground which falls outside the scope of the questions regarding which leave to appeal had been granted in order to avoid a miscarriage of justice. These are matters which *Sababumi* does not appear to have addressed – perhaps, because they were not raised in argument – and so, the focus of the decision lay elsewhere, more particularly, having decided the question of power against the appellant, understandably, it did not address the issue of **discretion**. (emphasis added)

If leave is not granted, the answer to the original question as framed would, in our view, be rendered merely academic and as stated earlier, it permits of any answer other than "It all depends!" Hence the need for the consequential question put forth by the defendant in order for this court to determine the appeal of the defendant.

In any event, the plaintiff cannot argue that it is prejudiced by us allowing for the second question to be put in by the defendant as the facts for determination of the said question are sufficiently within the plaintiff's knowledge as evidenced from exhs. 'VS1' and VS4'.

That put to rest the objection of the plaintiff. We now proceed to consider the questions:

> (1) Whether the Defendant against whom an application for a Mareva injunction is pending in Court is free to dispose of his assets until the moment when the Mareva injunction is granted against him;
>
> (2) if the answer to the said question is in the affirmative, then, can the Appellant/Defendant in this Appeal be found to have been guilty of being in contempt of court by interfering with the due administration of justice for his conduct in disposing of his assets, in all the circumstances of his case?

Question (1)

It seems there has been no decision by this court, as the apex court of this country, on contempt of court other than in matters pertaining to a breach of a court order or contempt committed in the face of the court and particularly in this case regarding disposal of assets by a defendant when there is an application pending for a mareva injunction before the court.

This fact has been acknowledged by the Court of Appeal at pp. 58/59 of the Appeal Record:

> Lastly, we would like to say that we are aware of the far-reaching consequences of this decision as this is perhaps the first time in this country that the court finds a person guilty of contempt not for breach of a particular order but for conduct of interfering with the due administration of justice or the course of justice, by disposing the subject matter of a pending proceeding under questionable circumstance to questionable people to frustrate the outcome of the proceedings and the execution thereof. This judgment must not be understood to mean that whenever there is a pending proceeding, any disposal of the subject matter of the proceedings or the assets of one of the parties thereto is contempt. No, far from it. Whether an act amounts to an interference with the due administration of justice or the course of justice and therefore contempt, or not, depends on the circumstances of each case.

The Court of Appeal in finding on the facts of the case that there was commission of contempt of court relied on what Llyod LJ in *Attorney-General v. Newspaper Publishing PLC* [1988] 1 Ch. 333 (CA), *inter alia*, said at p. 378:

> The act must be sufficiently serious and sufficiently closely connected with the particular proceedings.

This is premised on the fact that not all acts which are calculated to interfere with the administration of justice or the course of justice will necessarily ground a charge of contempt.

It is clear that the power to punish for contempt of court is provided in art. 126 of the Federal Constitution:

> 126. The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

There is a similar provision repeated in s. 13 of the Courts of Judicature Act 1964.

There is no specific legislation on contempt of court in this country.

By virtue of the above statutory provisions, it is correct, in our view, for the Court of Appeal to state:

> It is the common law principles that the courts of this country have been applying.

Following the principle, *Oswald's Contempt of Court*, 3rd edn provides a good guide to a general definition of contempt of court thus:

> To speak generally Contempt of Court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties litigants or their witnesses during litigation.

What therefore is contempt of court 'is interference with the due administration of justice' – per Nicholls LJ at p. 923 of *Attorney-General v. Hislop and Another* [1991] 1 All ER 911 (CA):

> In view of the generality of the phrase "interference with the due administration of justice" we are of the view that the categories of contempt are never closed. To that extent we respectfully endorse the statement made by Low Hop Bing J, in *Chandra Sri Ram v. Murray Hiebert* [1997] 3 CLJ Supp 518 at pp. 549-550:
>
> > The circumstances and categories of facts which may arise and which may constitute contempt of court, in a particular case, are never closed. This is the same position as in the case of negligence in which the scope for development is limitless. Contempt of court may arise from any act or form whatsoever, ranging from libel or slander emanating from any contemptuous utterance, news item, report or article, to an act of disobedience to a court order or a failure to comply with a procedural requirement established by law. Any of these acts, in varying degrees, affects the administration of justice or may impede the fair trial of sub judice matters, civil or criminal, for the time being pending in any court.
> >
> > The particular matrix of the individual case is of paramount importance in determining whether a particular circumstance attracts the application of the law of contempt. Hence, a positive perception of the facts is a prerequisite in deciding whether or not there is any contravention necessitating the invocation of the law of contempt.

In respect of question (1), Mr. Sithambaram, counsel for the defendant, submitted on the narrow ground that since there was no order made for mareva injunction and neither was an interim order applied for and made by the court, the defendant was at liberty to sell the properties and the alleged contemnors could not have had any *mens rea* for what they did. It was contended that what the Court of Appeal did was an unwarranted extension of the law and therefore unjust.

In this respect we need to consider two cases (also considered by the Court of Appeal). They are *Harrow London Borough Council v. Johnstone* [1997] 1 WLR 459 (HL (E)), and *In re Septimus Parsonage & Co.* [1901] 2 Ch. 424.

We fully subscribe to what Lord Mustill said in *Harrow* referring to a passage in the judgment of Lord Oliver of Aylmerton in *Attorney-General v. Times Newspaper Ltd* [1992] 1 AC 91. This is what His Lordship said at p. 469:

> It is not perhaps entirely clear what the reasoning of the House would have been if *the injunction had not existed at all*. A lead towards the answer is, I believe, given by Lord Oliver of Aylmerton, at p. 224:
>
> > If the court has taken into its hands the conduct of the matter to the extent of ordering the interim preservation in the interest of the plaintiff so that the issue between him and the defendant can be properly and fairly tried, it has to be accepted that that is what the court had determined that the interests of justice require. The gratuitous intervention of a third party intended to result in that purpose being frustrated and the outcome of the trial prejudiced, must manifestly interfere with and obstruct what the court has determined to be the interests of justice. *Those interests are not dependent upon the scope of the order.*
>
> This reasoning shows, I believe, that *even where there is no injunction to make explicit the importance of preserving the subject matter of an action until trial a wanton destruction of that subject matter, with the intention of impeding a fair and fruitful trial, is capable of being a contempt of court;* and indeed I would myself have been willing to recognize this possibility even without the guidance of the House. (emphasis added)

In *re Septimus Parsonage & Co.* [1901] 2 Ch. 424, it was held that:

> When a petition is pending for the winding-up of a company, it is a contempt of Court to issue a circular to shareholders of the company containing misrepresentations with the intent to obtain a resolution of the company for the voluntary winding-up thereof, and thereby mislead the Court as to the real view of the shareholders and prevent a compulsory winding-up order from being made.

Our answer to the first question would be in the affirmative subject to the qualification that there is no wanton destruction of the subject matter with the intention of impeding a pending proceeding for mareva injunction. It is the interests of justice that the court has to determine. It all depends on the circumstances of the particular case. The statement of law by the Court of Appeal in its judgment and set out in the earlier part of this judgment is a correct one. We cannot therefore accept the contention of Mr. Sithambaram that what the Court of Appeal did was an unwarranted extension of the law and therefore unjust.

Question (2)

The answer to question (2) is essentially centred on the finding of facts by the courts below.

The facts of the case have been narrated in detail by the Court of Appeal and we do not propose to repeat them here. We will set out the salient facts.

Arising out of disputes pertaining to a building contract executed by the parties, pursuant to an arbitration clause thereof the plaintiff commenced arbitration proceeding against the defendant sometime in 1997.

On 1 June 1998, the plaintiff filed OS 509/98 pursuant to s. 13(6)(f) and (h) of the Arbitration Act 1952 (Revised 1972) to secure some of the plaintiff's claim up to the value of RM2.5 million pending the award of the arbitrator. On the same date the plaintiff filed summons in chambers *ex parte* for mareva injunction against the defendant, *inter alia*, to restrain the defendant from disposing off its assets.

On 7 July 1998, the defendant filed OS 24-670-1998 (MT3) seeking removal of the arbitrator on the ground of alleged bias and obtained an *ex parte* injunction restraining the arbitrator.

On 20 July 1998, the parties recorded a consent order wherein the defendant agreed to deposit the sum of RM575,000 (being the retention sum) into a joint stakeholder account held by the solicitors for the respective parties pending the determination of the said arbitration.

We now need to examine the *ex parte* application of the plaintiff filed on 1 June 1998 for mareva injunction that eventually resulted in the contempt of court proceeding against the contemnors. According to counsel for the plaintiff the learned judge at the material time, Jeffrey Tan J, ordered the *ex parte* application be heard *inter partes*. From the *ex parte* application enclosed to the submission of counsel for the plaintiff we observe that it was fixed initially for hearing on 30 June 1998. Again, according to the counsel for the plaintiff, the matter was adjoined a number of times (the reasons of which we do not know or have the benefit of) until 14 August 1998 when the defendant through its solicitors pledged eight units of properties as security and the matter was adjourned to 29 August 1998. It seemed the plaintiff did not accept the pledge on the ground that it is insufficient.

After the *inter partes* application of the plaintiff was adjourned for hearing to 29 August 1998, the defendant started to take certain steps which in reality may amount to impeding or frustrating an order that may be made at the *inter*

partes hearing of the mareva injunction fixed on 29 August 1998. At that point of time the defendant was aware of the prayer of the plaintiff for a mareva injunction order.

While OS 509 and OS 670 were still pending in the High Court Penang, the defendant on 17 August 1998 took the unusual steps of filing civil suit No. 22-1075-98 at Shah Alam High Court ("Shah Alam Suit") against the plaintiff. The defendant, as plaintiff, in Shah Alam Suit was represented by another firm of solicitors, M/s Mahadevi & Nadchatiram & Partners. It is from this point onwards that the trouble started wherein the defendant more or less put its directors and general manager (the contemnors) in jeopardy of contempt of court.

In the Shah Alam Suit, the defendant's claims were identical to the defendant's counterclaim in the arbitration proceeding. On 27 August 1998 itself the defendant obtained an *ex parte* injunction order from the learned judge at Shah Alam High Court to restrain OS 509 and OS 670 and the arbitration proceeding and also an order directing RM575,000 held in stakeholders' account pursuant to the consent order be forthwith paid out to the defendant upon service of the *ex parte* order. The plaintiff, as defendant, in Shah Alam Suit took out two summonses to have the Shah Alam Suit struck out as an abuse of the process of court. The applications were heard and dismissed by the learned judge and hence the appeal by the plaintiff to the Court of Appeal which allowed the appeal and struck out the Shah Alam Suit as it smacked of an abuse of the process of court and the learned judge was held to have erred in the exercise of his discretion (see *Jasa Keramat Sdn. Bhd. v. Monatech (M) Sdn. Bhd.* [1999] 4 CLJ 533).

It would not perhaps be out of order for us to quote the observation of the Court of Appeal in respect of the Shah Alam Suit about the summons itself at p. 540 [1999] 4 CLJ 533:

> The respondent's (defendant) application was not marked as an *ex parte* summons. In fact it was, on its face, made returnable *inter partes* before the judge in chambers on 4 September 1998. However, for some inexplicable reason, it was heard *inter partes* on 27 August 1998.

27 August 1998 is the date that the writ was issued. We quote the observation of the Court of Appeal merely to show the conduct of the defendant, that is, the haste or speed with which the order was obtained and then served on the plaintiff the next day, 28 August 1998. It is our observation that the purpose of serving the order on 28 August 1998 on the Penang High Court judge Jeffrey Tan J, personally could not be for any other reason than to stall the continued hearing of the *inter partes* application of the plaintiff fixed on 29

August 1998. The object must inevitably be to defeat the plaintiff's application for an order to injunct the sale or otherwise of the defendant's assets. Not only that but the defendant managed to obtain an order from the High Court in Shah Alam to set aside a consent order (in which the defendant is a party) recorded before the High Court in Penang! It is no wonder then for Gopal Sri Ram JCA, speaking for the Court of Appeal in respect of the Shah Alam Suit to comment at p. 542 [1999] 4 CLJ 533 thus:

> What remains is to apply the relevant principles to the facts of the present appeal. When that is done, I am driven to the conclusion that the respondent plainly abused the process of the court not only in instituting the third action but in the steps it took therein.

On 12 May 1999, the defendant's application to the Federal Court for a stay of proceedings in respect of the Shah Alam Suit pending their appeal to the Federal Court was dismissed.

We accept that when the plaintiff succeeded in obtaining a mareva injunction order on 24 August 1999 all the units had been sold by May 1999 as can be seen at pp. 491-493 of the Appeal Record. The sales were made even before the caution by the learned judge in June 1999. But we must not forget that the application for mareva injunction was filed as early as 1 June 1998 and it was stalled for almost a year by the unusual steps taken by the defendant in filing the Shah Alam Suit against the plaintiff and obtaining an *ex parte* injunction order against the Penang High Court proceeding. The defendant was fully aware of the prayer for mareva injunction by the plaintiff in the Penang High Court. After the Shah Alam Suit was struck out by the Court of Appeal on 3 May 1999 the mareva injunction proceeding continued for hearing in June, July and August and only on 24 August 1999 did the High Court Penang granted the mareva injunction order against the defendant. By the time when the mareva injunction order was obtained on 24 August 1999, there was nothing to injunct. In other words it is only a paper order and of no value whatsoever. What need to be considered is not so much of no injunction order having been made and therefore the defendant is at liberty to dispose off its assets but more towards its conduct in disposing off its assets with its eyes open to the pending mareva injunction proceeding.

We do not propose to set out in detail the disposal of the assets of the defendant as they are sufficiently set out by the Court of Appeal. Suffice for us to say that the speed with which the assets were disposed off and for that matter to parties that are closely related to the persons in control of the defendant are not seriously disputed. It was not seriously challenged that the sales were made not at arms' length. In some of the sales the transfers were executed even without the full payments! Surprisingly, at the time when the

mareva injunction was granted, the defendant chose to remain silent and let the order be made knowing fully well that it would be a futile order and it would come to naught. The reason given for the silence was that the counsel had no knowledge of disposal of all the assets by the defendant. Is that a good reason? We must say that it is the duty of counsel to get instructions from the defendant on the disposal of its assets so that counsel can then inform the court accordingly in the event the court is minded to grant a mareva injunction order. It was only on 17 November 1999 that the defendant informed the plaintiff that there were no units left that led to the plaintiff subsequently taking steps towards contempt of court proceeding against the contemnors.

On the particular facts and circumstances of this case, we agree with the finding of the Court of Appeal in concluding that the intention of the defendant clearly is to interfere with due administration of justice or in the course of justice at p. 570 [2001] 4 CLJ 549:

> In any event, looking at all the facts of the respondent (defendant) company and the circumstances under which they were carried out from which the contemnors cannot disassociate themselves, the intention is too clear. It is no other than to dissipate all the assets of the respondent (defendant) company in questionable dealings to frustrate the mareva injunction proceedings then pending and any judgment that might be obtained later by the appellant (plaintiff) in the arbitration proceeding. Thus, their intention clearly is to interfere with the due administration of justice or in the course of justice.

We have examined the judgment of the learned judge and we are of the view that there was lack of positive perception of the facts of this case by him when he held that there was no contempt of court committed by the contemnors. He was more focused on there being no mareva injunction order or for that matter no interim order and therefore the defendant is at liberty to dispose off its assets.

On the issue of double jeopardy, we see no merits in this claim as clearly on the facts, the contempt of court referred to was in respect of obtaining an injunction order from the Shah Alam Court by the defendant restraining the Penang High Court proceedings. It was based on the letter dated 27 August 1998 addressed to the learned judge direct enclosing a copy of the injunction order of the Shah Alam Court for the learned judge to comply therewith. The present proceeding against the contemnors is for contempt of court for disposing off the assets in questionable dealings by the defendant knowing of the pending mareva injunction proceeding against it. The defendant tries to impede or defeat the pending mareva injunction proceeding and the Court of Appeal correctly, in our view, find their acts to be interference with the administration of justice or course of justice.

In that respect we agree with the Court of Appeal when it said:

> it is on that narrow ground and on those specific acts that the first contempt proceeding was initiated.

On the issue of the statement pursuant to O. 25 r. 2(2) of the Rules of the High Court 1980 on the insufficiency of the charge, we note that it was argued for the first time before the Court of Appeal but nevertheless it was considered by the Court of Appeal. This issue has been dealt with by the Court of Appeal. After setting out briefly the statement filed by the plaintiff, the Court of Appeal stated at p. 569 [2001] 4 CLJ 549:

> They never denied that they were involved in the acts complained of nor did they ever deny that they knew of the acts complained of. In fact all the three of them, through Khor Kok Thye filed affidavit and set out their defence which clearly shows that they knew the facts of the contempt alleged against them.

In support of its finding the Court of Appeal referred to what Azmi, SCJ (as he then was) said in the Supreme Court case of *Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd. & Ors.* [1986] 2 CLJ 109; ([1986] CLJ (Rep) 58) at p. 115 (p. 63):

> Lastly, as regards the complaint that the charge in the statement is defective in that it lacks particulars, we note that the alleged contempt in the statement is in the writing of the four letters by the advocate himself to the appellate Judges either directly or copied to them and others. Having regard to the contents of the letters which are referred to in the statement and exhibited in the verifying affidavit, we find it is sufficient for the advocate to know what the alleged contempt is against him, and to enable him to meet the charge and prepare his defence.

We agree and need say no more.

In the absence of a specific legislation on the contempt of court as stated earlier by us, the contempt of court in our country is guided by the common law principles. We agree with what was stated by Sir John Donaldson MR in *A-G v. Newspapers Publishing Plc.* (CA), *supra,* that the standard of proof is the criminal standard be it classified as 'civil contempt' or 'criminal contempt' though such classification may tend to mislead rather than to assist. Be that as it may, we are here concerned with the conduct involving an interference with the due administration of justice or the course of justice and not conduct involving a breach or assisting in the breach of a court order. In this case the standard of proof required is proof beyond reasonable doubt. This standard of proof had been approved by our Supreme Court in *Houng Hai Hong & Anor. v. MBf Holdings Bhd. & Anor. & 3 Other Appeals* [1995] 4 CLJ 427.

Though the Court of Appeal stated that *mens rea* of the contemnors need not be proved by citing *Re AG's Application, A.G. v. Butterworth* [1963] 1 QB 696 and the Federal Court case of *T.O. Thomas v. Asia Fishing Industry Pte. Ltd.* [1977] 1 MLJ 151 in support thereof, it proceeded to consider *mens rea* as well. After considering the acts of the defendant and the circumstances in which they were carried out from which the contemnors cannot disassociate themselves, the Court of Appeal ruled that the intention is too clear. The Court of Appeal proceeded to state thereafter:

> It is no other than to dissipate all the assets of the respondent (defendant) company in questionable dealings to frustrate the mareva injunction proceedings then pending and any judgment that might be obtained later by the appellant (plaintiff) in the arbitration proceeding.

We do not see any ground to disagree with the finding of facts by the Court of Appeal on the issue of contempt of court against the contemnors.

On the particular facts and circumstances of this case we would answer question (2) in the affirmative.

In the circumstances we dismiss this appeal with costs and affirm the order of the Court of Appeal. Deposit to go towards account of taxed costs.

My learned Chief Judge Malaya has seen the judgment and agreed with it.

As the remaining judge, Mohtar Abdullah FCJ, is unable to exercise his functions due to illness, this judgment is given pursuant to s. 78 of the Courts of Judicature Act 1964.